

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:WR:SCA:LN:TL-N-5802-99

LWKuo

date: NOV 3 1999

to: Chuck West, Revenue Agent
Southern California District - Laguna Niguel, FE 1311-GT

from: District Counsel, Southern California District, Laguna Niguel
Jeff A. Hatfield, Assistant District Counsel
Lisa W. Kuo, Attorney *LK*

subject: [REDACTED] and [REDACTED]
EIN: [REDACTED] and [REDACTED]
Year: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum is in response to your request to memorialize the advice we rendered to you over the telephone.¹

Issue

What is the effect of the "Motions to Quash Deposition Summons for Bank Records" which were sent, via facsimile, to Revenue Agent ("RA") Chuck West?

¹ All of the facts set forth in this opinion were obtained orally from Mr. West and some documents provided by him. We have made no independent investigation of the facts in this case. Our legal conclusions may change if the actual facts are different than the facts represented to us by Mr. West.

Conclusion

On their face, the motions do not meet the jurisdictional requirements of I.R.C. §§ 7609(b) and (h), and, if filed with the U.S. district court, should have been dismissed on jurisdictional grounds. However, if the motions were in fact filed and a proceeding to quash is now pending, despite the jurisdictional flaws, we must await the Court's order ruling on the motions to quash prior to proceeding with further action seeking enforcement of the summonses.

Facts

As part of your examination of "abusive trusts," RA Chuck West served two third-party summonses on the [REDACTED] ("the Bank") for the records of [REDACTED] and [REDACTED]. RA West served these summonses by certified mail, as permitted under I.R.C. § 7603(b), on [REDACTED]. On the same day, RA West sent notice of these summonses to [REDACTED] and [REDACTED] by certified mail, as required by I.R.C. § 7609(a). These notices were mailed to the trusts' respective last known addresses,² but were returned by the United States Postal Service as undeliverable.

The summonses set [REDACTED] as the time for appearance. On [REDACTED] (more than 20 days after the notices of summonses were served), RA West received, via facsimile, the two sets of the following papers from The Law Office of [REDACTED].

1. Motion to Quash Deposition Summons for Bank Records in the Matter of [REDACTED]
2. Points and Authorities in Support of Taxpayer's Motion to Quash Deposition Summons in the Matter of [REDACTED]³

These papers bore the following caption: "United States Tax Court [REDACTED] District." One set of the papers identifies "The Law Office of [REDACTED]" as the attorney for [REDACTED]. Another set identifies the same attorney as the attorney for [REDACTED]. Both sets of the papers seek to quash the summonses for the bank records of [REDACTED] and those of [REDACTED]. In addition to the bank records of the two trusts, both summonses requested the bank records of [REDACTED] and [REDACTED] as follows:

5. Signature cards for all accounts for which [REDACTED] and/or [REDACTED] had signature authority during [REDACTED].

² According to the Service's computer database, the last known address of both trusts is [REDACTED].

³ The points and authorities prepared by The Law Office of [REDACTED] cite to California procedural law, which law is irrelevant to a motion to quash a summons issued under I.R.C. § 7609.

RA West did not send a notice of the summonses to either [REDACTED] or [REDACTED]. According to RA West, each trust's return identifies [REDACTED] as trustee, but also shows [REDACTED] signing as trustee. According to the returns of [REDACTED] [REDACTED] is its trustee. According to [REDACTED] [REDACTED] is not a trustee of [REDACTED].

The Bank received both sets of the papers from The Law Office of [REDACTED] by mail. As a result, it refused to comply with the summonses.

Discussion

To prevent the enforcement of a third-party summons, a taxpayer must file a petition (or motion) to quash the summons within 20 days after the notice of the summons is sent to the taxpayer ("the 20-day period"). I.R.C. § 7609(b). The petition to quash must be filed in the U.S. district court that has jurisdiction over the third party (not the taxpayer). I.R.C. § 7609(h). Also, within the 20-day period, the taxpayer must mail, by certified or registered mail, a copy of the petition (or motion) to quash to the third party and to the Service (at the address indicated on the notice of summons). I.R.C. § 7609(b)(2). A taxpayer must conform to these jurisdictional requirements, in order to begin a proceeding to quash. See *Squire v. U.S.*, 96-1 USTC ¶ 50,239 (S.D. Ind. 1996); *Beam v. U.S.*, 90-2 USTC ¶ 50,595 (D. Ore. 1990), *aff'd*, 951 F.2d 358 (9th Cir. 1991).

In the present case, [REDACTED] and [REDACTED] apparently did not conform to these jurisdictional requirements. They apparently failed to properly serve the motions on the Service and apparently failed to file these motions in the proper court:

1. Improper service: RA West received a copy of the motions to quash, via facsimile, 31 days after the notices of the summonses were mailed to the trusts. Hence, the motions were apparently not served on the Service by certified or registered mail as required by I.R.C. § 7609(b)(2). Nor were they served within the 20-day period as required by I.R.C. § 7609(b)(2).

Generally, such failures to properly serve the Service would result in a dismissal of a proceeding to quash. See *Romanow v. U.S.*, 98-1 USTC ¶ 50,364 (W.D. Mich. 1998) [petition to quash dismissed for failure to timely serve the Service by certified or registered mail]; *Roebuck v. U.S.*, 98-1 USTC ¶ 50,178 (D.C. Iowa 1998) [no dismissal where Service is timely served with a copy of an unfiled petition, but served with a copy of the filed petition, five days after the 20-day period]; *Squire*, 96-1 USTC ¶ 50,239 [motion to quash dismissed because served on the Service 22 days after the date of the notice of summons]. However, since there were no certificates of service attached to copy of the motions received by RA West, we cannot determine if the motions were properly served on the District Director or on another office of the Service and if such motions were served within the 20-day period.

2. Wrong court, wrong venue: The motions were purportedly filed with the "United States Tax Court, [REDACTED] District." The United States Tax Court does not have jurisdiction to quash a summons. I.R.C. § 7609(h). The U.S. District Court has jurisdiction over such matters. *Id.* Hence, they were apparently not filed with the U.S. District Court as required by I.R.C. § 7609(h). Nor were they apparently filed with the district within which the Bank

resides or is found, as required by I.R.C. § 7609(h)(1). RA West issued the summonses to the [REDACTED] California, where the Bank resides or is found. See Masat v. U.S., 745 F.2d 985 (5th Cir. 1985); Cosme v. U.S., 708 F.Supp. 45 (E.D.N.Y. 1989). [REDACTED] California falls within the jurisdiction of the U.S. District Court for the Central District (Western Division) of California. 28 U.S.C. § 84. [REDACTED] California, where the motions were allegedly filed, falls within the jurisdiction of the U.S. District Court for the Central District (Southern Division) of California. *Id.*

So based upon the face of the motions, the motions were filed, if at all, in the wrong court and venue. Furthermore, since the Service apparently was not properly served with the motions, the motions do not meet the jurisdictional requirements of I.R.C. § 7609(b)(2). Hence, there apparently is no proceeding to quash currently pending that prevents the Bank from complying with the summonses. I.R.C. § 7609(d). See also, I.R.C. §§ 7604(a), (b) and (i).

Comments

We noticed two potential problems with the enforceability of the two summonses. First, each summons requested the records of [REDACTED] and [REDACTED] but the Service failed to give notice of the summonses to either of them. This failure to comply with the I.R.C. § 7609(a) notice requirements does not necessarily mean that a court will quash the third-party summons, with respect to [REDACTED] and [REDACTED]. See Sylvestre v. U.S., 978 F.2d 25 (1st Cir. 1992); Rivera v. Chase Manhattan Bank et al., 84-1 USTC ¶ 9371 (S.D.N.Y. 1984). However, the failure to serve notice presents a substantial hazard that the summonses will not be enforced, and, the district should consider serving new summonses for these records. But, in the present case, RA West has informed us that he no longer seeks the records of [REDACTED] and [REDACTED]. Therefore, the enforceability of the summonses with respect to these records is a moot issue.

Second, the notices of these summonses sent to [REDACTED] and [REDACTED] were returned by the United States Postal Service as undeliverable. We do not know if the trusts will allege that the Service failed to send the notices of the summonses to their last known addresses. If the Service so failed, the court will then (in a proceeding to quash) decide to quash or enforce the summonses based upon whether the Service acted in good faith and whether harm will come to the taxpayer. See, Cook v. U.S., 104 F.3d 886 (6th Cir. 1997); Fitzmaurice v. U.S., 97-2 USTC ¶ 50,657 (N.D. Calif. 1992); Underwood v. U.S., 85-2 USTC ¶ 9850 (D. Kan. 1985). Acting in good faith means the Service met the four requirements⁴ as set forth in Powell v. U.S., 379 U.S. 48, 57-58 (1964). *Id.* No harm to the taxpayer means the taxpayer had actual knowledge of the

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- ⁴ 1) The examination to which the summons relates is being conducted pursuant to legitimate purposes.
 - 2) The summons seeks information that may be relevant to those purposes.
 - 3) The Service is not already in possession of the information.
 - 4) The administrative steps required by the Internal Revenue Code have been followed.

A failure to follow the notice requirements of I.R.C. § 7609(a) does not mean that the administrative steps have not been followed. See Cook, 104 F.3d 886; Fitzmaurice, 97-2 USTC ¶ 50,657; Underwood, 85-2 USTC ¶ 9850.

summons and had the opportunity to timely begin a proceeding to quash the summons. *Id.* At this time, we do not know all of the facts and circumstances to determine whether the trusts will suffer harm from the enforcement of the summonses (assuming the notices of summonses were not sent to the last known address).

Suggestions

We suggest that you first ascertain that there is no proceeding to quash pending in the U.S. District Court. We telephoned the docket room for the U.S. District Court for the Central District of California, Southern Division and Western Division, and were not able to ascertain if the motions have been filed. As a precautionary matter (just in case the taxpayers attempted to file their motions in the following district), we also telephoned the docket room for the U.S. District Court for the Southern District for California and ascertained that no such motions have been filed with that district to date.

According to the docket rooms for the Southern Division and Western Division of the Central District of California, you must go to the court and search their records, or, make a written request for a search of their records. Written requests are sent to the following addresses:

U.S. District Court for the Southern District of California, Southern Division
411 West Fourth St., Suite 1-053
Santa Ana, California 92701-4516
Attn: Trena
(714) 338-4768

U.S. District Court for the Southern Division of California, Western Division
312 N. Spring St.
Los Angeles, California 90012
Attn: Correspondence Clerk
(213) 894-3537

With the written request, enclose a copy of the first page of the motions and a self-addressed stamped envelope.

If there is a proceeding to quash pending

If there is a proceeding to quash pending, then we must await the outcome of the proceeding before taking any steps to enforce the summonses.

If there is no proceeding to quash pending

If there is no proceeding to quash pending, we suggest that you contact [REDACTED]
[REDACTED], verify that it is the trustee of both trusts and ask whether [REDACTED]
[REDACTED] is a trustee of both trusts - ask for a copy of the trust documents.

If [REDACTED] is the trustee

If [REDACTED] is the trustee of both trusts, ask the following:

1. If it is aware of the summonses issued to the Bank. If so, when it became aware of the summonses.
2. What is the current address of each trust? If it is different from the [REDACTED] address, whether the trust informed the Service of the address change.
3. Whether The Law Office of [REDACTED] is authorized to represent the trusts. If so, we suggest that you call that office and ask if they filed the motions. If this attorney has filed the motions, ask the attorney where the motions were filed and ask for a copy of the filed motions. If there is a pending proceeding to quash, then we must await the outcome of the proceeding before taking any steps to enforce the summonses.
4. Whether it has any objection to the Bank complying with the summonses.

If [REDACTED] does not have any objection then we suggest that you advise the Bank that the motions do not meet the jurisdictional requirements of I.R.C. §7609(b)(2). Hence, there is no proceeding to quash currently pending that prevents the Bank from complying with the summonses. I.R.C. § 7609(d). See also, I.R.C. §§ 7604(a), 7609(b) and 7609(i). We suggest that you remind the Bank that it has a duty to comply with the summonses under I.R.C. § 7609(i)(1). As discussed above, since RA West no longer seeks the records of [REDACTED] and [REDACTED] we further suggest that you so advise the Bank.

To afford the Bank protection against liability to the trusts for disclosing the summonsed records to the Service,⁵ we suggest that you complete the certificates, which can be found on the reverse side of the original summonses, and issue them to the Bank. I.R.C. § 7609(i)(3). These certificates will inform the Bank that no proceeding to quash was begun within the 20-day period and that the 20-day period has expired. Upon receiving these certificates, I.R.C. § 7609(i)(3) protects the Bank against being liable to the trusts for disclosing their records to the Service.

If [REDACTED] has an objection, you may have to reissue the summonses and notice of summonses in order to provide the trusts the opportunity to timely begin a proceeding to quash as discussed above. As discussed above, we do not know all of the facts and circumstances and, therefore, cannot determine if reissuing the summonses would be necessary.

If [REDACTED] is not the trustee

If [REDACTED] is not the trustee, you must determine who is the trustee or has the authority to act on behalf of each trust. Once you have made this determination, you may have to reissue the summonses and notice of summonses in order to provide the trusts the opportunity to timely begin

⁵ As discussed above, if there is a proceeding to quash pending, you must await the outcome of that proceeding before taking any steps to enforce the summonses.

a proceeding to quash as discussed above. Again, we do not know all of the facts and circumstances and, therefore, cannot determine if reissuing the summonses would be necessary.

If you need further assistance, please call Lisa Kuo at (949) 360-2689. We are closing our file at this time.